

Severson & Werson's Labor and Employment Practice

Group works closely with employers to develop strategies that help prevent employment claims. The Group also represents employers in defending a wide range of civil litigation and administrative claims.

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The *Kenneth Cole* Decision: A Seismic Shift in California's Wage and Hour Law

California employers suffered a significant shakeup last Monday when the California Supreme Court handed down its long-awaited decision in *Murphy v. Kenneth Cole Productions, Inc.*, No. S140308. The Court found that California's fine on employers that deny employees proper meal and rest breaks is a wage, not a penalty. While it may seem like a minor technicality, this decision dramatically increases an employer's exposure to liability in two ways: (1) employees may still recover penalties in addition to the fine for missed breaks; and (2) employees may recover for up to three years of missed breaks.

The Baseline

California's Labor Code requires employers to provide "non-exempt" employees (*i.e.*, employees protected by the minimum-wage/maximum-hour laws):

- a 30-minute unpaid meal break after no more than 5 hours each workday, which can be waived if the employee works no more than 6 hours in a day (Cal. Lab. Code § 512(a));
- a second 30-minute unpaid meal break after no more than 10 hours each workday, which can be waived if the employee works no more than 12 hours in a day (*Ibid.*); and
- a 10-minute paid rest break for each 4 hours worked or each portion of a shift that is at least 2 hours long (unless the entire shift is less than 3½ hours long, in which case no rest break need be provided), ideally near the middle of each 4-hour period or "major fraction" thereof. (*Ibid.*)

Employees who do not receive these breaks may recover an award of one hour of wages for each meal break denied and one hour of wages for any number of rest breaks denied each workday, even if the missed break time was paid time. Labor Code § 226.7(b).

The New Terrain

Monday's Supreme Court decision in *Kenneth Cole* broke new ground by deciding the fines provided by Labor Code § 226.7(b) constitute "wages," not penalties. As a result, employees who successfully raise meal- and rest-break claims are entitled to receive both Section 226.7(b) fines and penalties under the Labor Code, including "waiting time" penalties of up to thirty days' wages for former employees. Labor Code §§ 201, 202.

Another impact of the *Kenneth Cole* decision is that employees now have three years to bring claims and can sue for up to three years' worth of fines, rather than just one. Furthermore, plaintiffs' attorneys will likely argue that, since the fines are wages, employees are entitled to sue under California's Unfair Competition Law, Business and Professions Code §§ 17200 *et seq.* ("the UCL"). The UCL, which applies to claims for wage recovery but not for recovery of penalties, has a four-year statute of limitations and provides for "private attorney general" actions, long a favorite of the plaintiffs' class-action bar. Finally, the *Kenneth Cole* decision means employers face increased risk if they appeal administrative determinations on wage and hour claims. The *Kenneth Cole* court found that a trial court may, on appeal from an administrative agency's decision, consider entirely new claims. As a result, employers seeking to overturn the Department of Labor Standards Enforcement's ("the DLSE's") administrative decisions risk creating additional liability.

Managing the Aftershocks

The *Kenneth Cole* decision significantly impacts every California employer. It is critical that employers take immediate steps to minimize the economic impact of the decision. Employers should:

- Ensure employees are properly classified as exempt or non-exempt under the wage and hour statutes and consult with counsel if any classifications might require revision.
- Make sure employees are permitted – and required – to take their meal and rest breaks. Implement written policies regarding mandatory breaks and timekeeping procedures, distribute them to employees and keep copies signed by employees, as well as accurate time records of employees' breaks. Maintain such records for at least four years.
- Train supervisors to enforce the rules. Employers should not ask or allow employees to work during their meal or rest breaks and should make sure employees are completely free from work duties during their breaks.
- Have management or Human Resources counsel employees who fail to take their mandatory meal or rest breaks or to keep proper records of their break time as soon as the problem is discovered. For multiple infractions, they should receive appropriate disciplinary action.

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